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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
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10 UNITED STATES OF AMERICA,

11 Plaintiff,

Case No. 2:99-CR-00189-KJD-

12 v.

ORDER

13 STEPHEN BURRELL,

14 Defendant.

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16 Presently, the Court has before it Stephen Burrell's Petition for Writ of Coram Nobis (#126).
17 In response, the Government filed a Motion to Summarily Dismiss Petition for Writ of Coram Nobis
18 (#132).

19 In his petition, Burrell seeks a writ of coram nobis on the grounds that his sentence exceeds
20 the statutory maximum under the rule initially announced in Apprendi v. New Jersey, 530 U.S. 466
21 (2000) and applied in Blakely v. Washington, 542 U.S. 296 (2004), and United States v. Ameline,
22 409 F.3d 1073 (9th Cir. 2005). Burrell's petition lacks merit for two principle reasons. First, the
23 rule initially announced in Jones v. United States, 527 U.S. 227 (1999) and Apprendi v. New Jersey,
24 530 U.S. 466 (2000), and further developed in Blakely v. Washington, 542 U.S. 296 (2004), and
25 United States v. Booker, 543 U.S. 220 (2005), is that the Sixth Amendment requires that any fact
26 (other than a prior conviction) which is necessary to support a sentence exceeding the maximum

1 authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the
 2 defendant or proved to a jury beyond a reasonable doubt. While a new rule of criminal law is
 3 retroactively applied to cases then pending on direct review, these new rules cannot be applied
 4 retroactively to cases on collateral review unless they fall within one of the enumerated exceptions.
 5 See Schriro v. Summerlin, 542 U.S. 348, 352 (2004); Teague v. Lane, 489 U.S. 303-10 (1989). To
 6 fall under one of the exceptions, the new rule must be substantive or, if procedural, it must be a
 7 watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the
 8 criminal proceedings. See Schriro, 542 U.S. at 351-52, Teague, 489 U.S. at 307. Burrell's
 9 conviction became final on direct review when the United States Supreme Court denied his petition
 10 for writ of certiorari on April 15, 2002. See Burrell v. United States, 535 U.S. 1008 (2002); see also
 11 Caspari v. Bohlen, 510 U.S. 383, 390 (1994) (holding that direct appeal becomes final upon denial of
 12 certiorari petition). Petitioner's case became final on direct review well before Booker, Blakely and
 13 Ameline were decided. Accordingly, Petitioner may only avail himself of the rules in Booker,
 14 Blakely and Ameline if they fall under what is commonly called the Teague exceptions.
 15 Unfortunately for Burrell, the courts have consistently held that these rules do not fall under either of
 16 these exceptions and thus are not retroactive to cases on collateral review. See United States v. Cruz,
 17 423 F.3d 1119, 1120 (9th Cir. 2005); Schardt v. Payne, 414 F.3d 1025, 1036 (9th Cir. 2005); United
 18 States v. Sanchez-Cervantes, 282 F.3d 664, 665 (9th Cir. 2002).

19 The second reason Burrell's petition lacks merit is that a petition for writ of coram nobis is
 20 the wrong procedural vehicle for the relief he now seeks. A writ of coram nobis only affords a
 21 remedy to attack a conviction when the petitioner has served his sentence and is no longer in custody.
 22 See United States v. Kwan, 407 F.3d 1005, 1009 (9th Cir. 2005). This writ provides a remedy for
 23 those suffering from the lingering collateral consequences of an unconstitutional or unlawful
 24 conviction based on errors of fact and egregious legal errors. See id. (quoting Estate of McKinney
 25 By and Through McKinney v. United States, 71 F.3d 779, 781 (9th Cir. 1995)). In his petition,
 26 Petitioner concedes that he is still in custody. Moreover, Petitioner has previously moved

1 unsuccessfully for relief under 28 U.S.C. § 2255, and he cannot avoid the procedural bar merely by
2 fashioning a successive post-conviction claim as a petitioner for writ of coram nobis. See Matus-
3 Leva v. United States, 287 F.3d 758, 761 (9th Cir. 2002).

4 Accordingly, IT IS HEREBY ORDERED that the Government's Motion to Summarily
5 Dismiss Petition for Writ of Coram Nobis (#132) is **GRANTED**.

6 IT IS FURTHER ORDERED that Petitioner Stephen Burrell's Petition for Writ of Coram
7 Nobis (#126) is **DENIED**.

8 DATED this 31st day of January 2007.

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12 Kent J. Dawson
13 United States District Judge
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